



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy

File: EAC 00 064 52128 Office: Vermont Service Center Date:

JAN 18 2001

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

Identifying data removed to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:


This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company involved in the marketing of queue management systems, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive and head of American operations. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity, or that a viable business entity exists.

On appeal, the petitioner submits a brief in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 1994 and that it is a branch of [REDACTED], located in Malaysia. The petitioner declares three employees and a gross annual income of approximately \$140,000. It seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$35,000.

At issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner describes the beneficiary's duties as "[m]arketing of queue management systems in the USA and will be in charge of all American operations of American branch subsidiary that will entail all duties and responsibilities associated with such a position."

In a letter dated January 19, 2000, the Service requested that the petitioner respond to the following:

Provide the following information regarding the beneficiary/beneficiaries:

1. Names of all employers, dates of employment, and places of employment for the past six years.
2. If employed in the United States, beneficiary/beneficiaries' immigration status (for example, H-1, L-1, etc.) for each employer.
3. If original date of "H" and/or "K" classification was more than six years ago, provide the above information for all employment since that original date.
4. If the alien's employment is or has been intermittent, seasonal, or an aggregate of six months or less per year, submit evidence that employment. Such evidence may include a letter from you explaining the employment plus documentation of the alien's time

outside the United States--travel, employment, habitation, etc.

5. If the beneficiary was in any "H" or "L" classification during the period requested in item #1 above, submit evidence of the beneficiary's time in the United States in that classification.

Submit evidence that shows the beneficiary has been maintaining a valid nonimmigrant status, as a(n) L-1A, at the time of filing this petition.

The beneficiary's stay expired as of September 30, 1999. However, you did not file the current position until December 21, 1999.

Submit evidence that the United States organization has engaged in the regular, systematic and continuous provision of goods or services.

Submit evidence that establishes the duties performed by the beneficiary in the past year and the duties he/she will perform if the petition is extended.

You have not sufficiently described the beneficiary's duties to demonstrate that he/she is employed in a qualifying capacity.

Submit evidence of the staffing of the United States organization. Indicate the number of employees, the duties performed by each employee or each section, as well as management and personnel structures of the United States firm.

Submit evidence that establishes the financial status of the United States organization.

Submit copies of your United States entity's business bank statements covering the last three months.

Submit a copy of the latest United States income tax return filed by the United States entity including all schedules.

In response to the request for additional information, the beneficiary stated that:

The following are the answers to the itemized list in your notice of action:

- 1) Path Synergy is the only employer under which I applied for L-1 status.
- 2) I was under the L-1A status.
- 3) It was less than six years.
- 4&5) I was in fact most of the time outside of the US, due to unsuitability of the product for this country, arranging, coordinating and managing the development of the products as I honestly outlined in my accompanying letters in my previous petitions. Please refer to relevant copies from my travel document on the dates of arrival and departures.

The beneficiary further stated that:

I am the owner of the company and I act in my capacity to ensure that a product is designed and produced. If FCC & CSA certification are granted I shall make sure that I will perform my duty in this final chance if the petition is extended for two more years.

It's a pity that the previous two attempts had been a failure at the very start. I, the beneficiary shall be acting as president of the company governing the launching of the product, managing the personnel in marketing and in implementation of the system.

Initially, one marketing personnel and one technician doing the installation and commissioning of the system shall be engaged. it may take six months to make headway in the early stages of introduction and marketing of the product. Once initial sales are picked up, we will then have references to show to prospective customers. Any increment of staff strength will only come after three quarters in operation. I will work fully on the management side and leaving the technical side to others.

The company is basically dormant at the moment. I have started to bring in money to get ready for the start once we have the permit for the goods to be imported. I enclose a bank statement for your perusal.

The director noted that:

A review of the record reveals that the business has generated no income since its initial establishment nor have additional personnel been hired. Further, the business has remained in a dormant stage while the beneficiary has attempted to promote or establish business activities. The actual business premises are located in a residential apartment which is insufficient

for a viable business entity. No business tax returns have been submitted and the bank statement shows minimal funds or activity for the business itself.

On appeal, the beneficiary reiterates her argument that, although the petitioning company is still dormant, she is making an honest attempt to get the business going. The beneficiary states that:

The funds indicated is indeed minimal but I am in a lot better position than the starting days of Apple Computer, Hewlett Packard or some dot.com companies because I have a product to start with. I do not need to spend very much on the production at this juncture, they will be made in the East. To make it happen, I really need to have a peace of mind under L-1A status with stable residence and this is what I am appealing to obtain and on which a genuinely viable business could finally be established. After all, if I still failed this time, I would have exhausted any reasonable logic to ask for future consideration.

The petitioner's argument has been taken into consideration, however, while the U.S. entity may still be developing, Service regulations are exacting in requiring a new office to demonstrate its progress after the initial one-year period. 8 C.F.R. 214.2(l)(14)(ii).

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Further, it has not been demonstrated that the U.S. company is a viable entity engaged in the regular, systematic, and continuous provision of goods and services. For these reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section

291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.